

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

ARTHUR VAN SWAIT,  
Petitioner,  
v.  
M.S. EVANS,  
Respondent.

Case No. CV 08-5821 ABC (AN)

ORDER SUMMARILY DISMISSING  
PETITION FOR WRIT OF HABEAS  
CORPUS AND DIRECTING PETITIONER  
ARTHUR VAN SWAIT TO CEASE AND  
DESIST FROM FILING REPETITIVE AND  
FRIVOLOUS HABEAS PETITIONS

Before the Court is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 that Arthur Van Swait, a state prisoner proceeding *pro se*, filed with this Court on September 5, 2008. The Court has reviewed the petition pursuant to its duty to screen petitions prior to service and finds it is substantively similar to the four petitions that Van Swait recently filed in July, 2008, all of which were summarily dismissed pursuant to the Court's Order dated August 27, 2008, a copy of which is attached to this Order as Exhibit A.

Like the four petition filed in July, the pending petition does not raise any claims directed at Van Swait's current state custody arising from his 2002 conviction for carjacking, robbery and unlawful taking of a vehicle ("2002 Conviction"). Instead, Van Swait is once again using the petition as a vehicle to bring a Rule 60(b)(6) motion that

1 is directed at two of the Magistrate Judge's orders that were issued in connection with  
2 Van Swait's habeas petition filed in CV 05-1732 ABC AN ("2005 Action"), which was  
3 dismissed on June 9, 2006. (*See* 8/27/08 Order at 2:3-3:3.) Consequently, the pending  
4 petition is subject to summary dismissal because it is not directed at Van Swait's state  
5 custody arising from his 2002 Conviction. (*See* 8/28/08 Order at 5:20-6:4.)  
6 Alternatively, even if the Court could consider the attached Rule 60(b)(6) motion, or  
7 even assuming that Van Swait had filed the attached Rule 60(b)(6) motion as a post-  
8 judgment motion in the 2005 Action, the Court finds the motion is untimely and fails to  
9 show extraordinary circumstances warranting relief to prevent a manifest injustice. (*See*  
10 8/28/08 Order at 6:5-7:25.)

11 Based upon the foregoing, the petition is summarily dismissed.


12 Further, Van Swait is further ordered to cease and desist from filing further habeas  
13 petitions for the purpose of bringing repetitive and frivolous Rule 60(b) motions directed  
14 at orders relating to the 2005 Action. As the Supreme Court has recognized, "[e]very  
15 paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires  
16 some portion of the institution's limited resources. A part of the Court's responsibility is to  
17 see that these resources are allocated in a way that promotes the interests of justice." *Day*  
18 *v. Day*, 510 U.S. 1, 2, 114 S.Ct. 4, 5, 126 L.Ed.2d 1 (1993), citing *In re McDonald*, 489 U.S.  
19 180, 184, 109 S.Ct. 993, 996, 103 L.Ed.2d 158 (1989) (*per curiam*). "The goal of fairly  
20 dispensing justice . . . is compromised when the Court is forced to devote its limited  
21 resources to the processing of repetitious and frivolous requests." *Whitaker v. Superior*  
22 *Court of San Francisco*, 514 U.S. 208, 210, 115 S.Ct. 1446, 1447, 131 L.Ed.2d 324 (1995),  
23 citing *In re Whitaker*, 513 U.S. 1, 2, 115 S.Ct. 2, 3, 130 L.Ed.2d 1 (1994). Van Swait's  
24 repetitive, duplicate filings misuse the Court's limited resources, compromise the goal of  
25 fairly dispensing justice, and abuse the judicial process. Consequently, in addition to  
26 being ordered to cease and desist from filing habeas petitions to bring Rule 60(b)  
27 motions directed at orders relating to the 2005 Action, Van Swait is warned that the next  
28 repetitive or duplicate petition, application, motion, or request for federal habeas relief

1 will be denied and dismissed with prejudice as a vexatious and frivolous petition that  
2 was filed in disobedience of this Court Order. Further, Van Swait is notified and warned  
3 that he shall be declared a vexatious litigant and will be barred from filing similar  
4 habeas petitions without the prior approval of the assigned Magistrate Judge. No further  
5 notice will be given.

6 For the reasons discussed above, the reference to the Magistrate Judge is vacated  
7 and the petition is summarily dismissed. Petitioner's request for an evidentiary hearing,  
8 and any other pending applications, motions, and requests, are denied as moot.

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10 IT IS SO ORDERED.

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13 Dated: September 19, 2008

  
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AUDREY B. COLLINS  
UNITED STATES DISTRICT JUDGE

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17 Presented by:

18  
19 /s/ Arthur Nakazato  
20 Arthur Nakazato  
United States Magistrate Judge

## EXHIBIT A

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

ARTHUR VAN SWAIT,

Petitioner,

v.

M.S. EVANS,

Respondent.

Case No. CV 08-04478 ABC (AN)

Case No. CV 08-04603 ABC (AN)

Case No. CV 08-04846 ABC (AN)

Case No. CV 08-04982 ABC (AN)

ORDER SUMMARILY DISMISSING  
FOUR PETITIONS FOR WRIT OF  
HABEAS CORPUS FILED BY  
PETITIONER ARTHUR VAN SWAIT

Before the Court are four petitions for writs of habeas corpus that Arthur Van Swait, a state prisoner proceeding *pro se*, filed with this Court in July 2008. The Court has reviewed the petitions pursuant to its duty to screen petitions prior to service and finds the petitions are very similar. Accordingly, in the interests of justice and judicial economy, the Court will consider the petitions together. Further, for the reasons discussed below, the petitions are summarily dismissed.

**I. Background****A. Prior § 2254 petitions**

Van Swait is currently in state custody pursuant to a criminal conviction and related twenty-four year prison sentence for carjacking, robbery, and the unlawful taking of a vehicle that he sustained in 2002 following a jury trial in the Superior Court for Los

1 Angeles County in case no. SA044542 ("2002 Conviction"). He has previously filed two  
2 § 2254 habeas petitions with this Court in connection with his 2002 Conviction.

3 **1. 2005 Action**

4 The initial petition was filed on March 9, 2005. (CV 05-1732 ABC (AN) ("2005  
5 Action").) However, the Court's pre-service review disclosed the initial petition was  
6 subject to dismissal because, among other things, it was a mixed petition that also raised  
7 several non-cognizable claims, and had attachments that were malodorous, filthy and  
8 unsafe to handle without surgical gloves. (2005 Action, 5/18/05 Order at 2-3 (docket  
9 no. 12).) Accordingly, Van Swait was granted leave to file a first amended petition to  
10 cure the defects. (*Id.*) Van Swait eventually filed a first amended petition (docket no.  
11 53) that raised five claims, however, a pre-service review disclosed the first amended  
12 petition was also subject to summary dismissal as a mixed petition because the first,  
13 second and fifth claims were unexhausted. (*Id.*, 1/13/06 Memorandum and Order  
14 ("1/13/06 Order") (docket no. 66).) Accordingly, Van Swait was granted leave to file  
15 a second amended petition in order to correct this defect. (*Id.*) Van Swait, however,  
16 failed to file a second amended petition in the time and manner directed by the 1/13/06  
17 Order. Therefore, on June 9, 2006, the 2005 Action was dismissed without prejudice on  
18 the ground that the first amended petition was a mixed petition. (*Id.*, 6/9/06  
19 Memorandum and Order Dismissing Action Without Prejudice (docket no. 84); 6/9/06  
20 Judgment (docket no. 85). Van Swait appealed the judgment of dismissal but his  
21 requests for certificates of appealability were denied by this Court and the United States  
22 Court of Appeals for the Ninth Circuit, respectively. (*Id.*, 09/28/06 Order (ABC) (docket  
23 no. 92); 5/14/07 Circuit Order (docket no. 105).)

24 During the 2005 Action, Van Swait also filed numerous motions, including the  
25 following two motions that are relevant to the pending proceedings: (1) a motion for  
26 order directing the Attorney General to have a certified court stenographer transcribe an  
27 audiotape ("motion for transcription") (docket no. 14) and (2) an "application for  
28 suppression of illegally intercepted wire communication" ("suppression motion") (docket

no. 29).) The Magistrate Judge denied both of these motions. (*Id.*, 12/29/05 Order denying motion for transcription (docket no. 51); 12/29/05 Order denying motion for transcription (docket no. 44).)

## **2. 2007 Action**

On September 5, 2007, Van Swait filed another § 2254 petition raising two claims seeking relief from his state custody arising from his 2002 Conviction. (CV 07-05766 ABC (AN) (“2007 Action”).) On November 21, 2007, the 2007 Action was dismissed with prejudice because this Court found both claims were time-barred and, alternatively, the claims lacked merit. (*Id.*, Judgment (docket no. 14).) Van Swait has appealed the judgment dismissing the 2007 Action and the appeal is still pending. (*Id.*, 2/14/08 Ninth Circuit Notice of Appeal Form (docket no. 28).)

## **B. Pending Proceedings**

In July 2008, Van Swait constructively filed the four pending § 2254 petitions with this Court. (See CV 08-4478 ABC (AN) (“Petition A”); CV 08-04603 ABC (AN) (“Petition B”); CV 08-04846 ABC (AN) (“Petition C”); and CV 08-04982 ABC (AN) (“Petition D”).) None of the four petitions raise any traditional federal habeas claims directed at Van Swait’s current state custody arising from his 2002 Conviction. Instead, all of the petitions are being used to bring post-judgment motions pursuant to Fed. R. Civ. P. 60(b) (“Rule 60(b)”) that are directed at the three orders issued by the Magistrate Judge and the Court’s order and related judgment of dismissal in the 2005 Action. Specifically, the motions attached to Petitions A, B, and C, which are brought pursuant to Rule 60(b)(6), are directed at the Magistrate Judge’s following orders: (1) the 12/29/05 Order denying motion for transcription, (2) the 12/29/05 Order denying suppression motion, and (3) the 1/13/06 Order finding the first amended petition was subject to dismissal as a mixed petition. (Petition A at 5, attached “Permission Requested to File Fed. Rule Crim. (sic) Proc. Rule 60 (b)(6) Motion” at 5; Petition B, attached “Permission Requested to File a Rule 60(b)(6) Motion, District Court M&O is Void Judgment” at 5; and Petition C, attached “Permission Requested to File a Rule 60(b)(6)

1 Motion, District Court Orders (M&O #66) and (Suppression 1 Denied #51) are Both  
 2 Void Judgments” at 6, 34.) The motion attached to Petition D, which is brought  
 3 pursuant to Rule 60(b)(4) & (6), challenges the Court’s order and related judgment  
 4 dismissing the 2005 Action. (Petition D, attached “Permission Requested to File a Rule  
 5 60(b)(6) Motion, District Court M&O is Void Judgment” at 4-5, 26.)

## 6 II. Discussion

### 7 A. Standard of Review

#### 8 1. Habeas Rules

9 “A discrete set of Rules governs federal habeas proceedings launched by state  
 10 prisoners. *See* Rules Governing Section 2254 Cases in the United States District Courts[,  
 11 28 foll. U.S.C. § 2254 (“Habeas Rules”).]” *Mayle v. Felix*, 545 U.S. 644, 654, 125 S.Ct.  
 12 2566, 2569 (2005). The discrete Rules include Habeas Rule 2(c), which imposes a  
 13 “more demanding” pleading standard than the notice pleading used for complaints in  
 14 ordinary civil cases. *Felix*, 545 U.S. at 655. Under Habeas Rule 2(c), a petition must  
 15 “specify all the grounds for relief available to the petitioner [and] state the facts  
 16 supporting each ground[;... and] the petition is expected to state facts that point to a real  
 17 possibility of constitutional error.” *Id.* Further, in *Felix*, the Supreme Court held:

18 A prime purpose of [Habeas] Rule 2(c)’s demand that habeas petitioners  
 19 plead with particularity is to assist the district court in determining whether  
 20 the State should be ordered to “show cause why the writ should not be  
 21 granted.” § 2243. Under Habeas [] Rule 4, if “it plainly appears from the  
 22 petition ...that the petitioner is not entitled to relief in district court,” the  
 23 court must summarily dismiss the petition without ordering a responsive  
 24 pleading.

25 *Id.* at 656. Also, the Advisory Committee Notes to Habeas Rule 4 expressly provide that  
 26 “it is the duty of the court to screen out frivolous applications and eliminate the burden  
 27 that would be placed on the respondent by ordering an unnecessary answer,” particularly  
 28 where the petition does not state facts “that point to a real possibility of constitutional



error.” Habeas Rule 4, Advisory Committee Notes (1976 Adoption). Local Rule 72-3.2 of this Court also authorizes a magistrate judge to prepare proposed order for summary dismissal and proposed judgment for district judge if it plainly appears from the face of petition that petitioner is not entitled to relief.

## 2. § 2254

Under 28 U.S.C. § 2254(a), as amended by the Antiterrorism and Effective Death Penalty Act (“AEDPA”), 110 Stat. 1214 (1996), this Court cannot entertain a state prisoner’s habeas petition unless the petition raises claims that challenge the prisoner’s state “custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” Moreover, federal habeas relief “shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” § 2254(d)(1)-(2). The key to triggering § 2254’s deferential standard is a previous “adjudicat[ion] on the merits in State court proceedings.”

## B. Analysis

The Court finds all four of the pending petitions are subject to summary dismissal. None of the petitions raise any cognizable habeas claims directed at seeking relief from Van Swait’s current state custody arising from his 2002 Conviction.<sup>1/</sup> Instead, as discussed above, the four petitions are simply being used as vehicles to bring the attached Rule 60(b) motions directed at this Court’s orders and judgment in the 2005

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<sup>1/</sup> Indeed, in the Rule 60(b) motion attached to Petition D, Van Swait even asserts “[t]his Rule 60(b)(6) motion challenges (only) the district court’s failure to reach the merits of a claim raised in the District Court habeas proceeding,....[and] does not assert, or reassert claims of error in the state conviction.” (Petition D, Rule 60(b) motion at 5.)



1 Action.<sup>2/</sup> Accordingly, the pending petitions are subject to summary dismissal because  
 2 the petitions are not directed at his state custody arising from his 2002 Conviction and  
 3 do not raise any habeas claims upon which relief may be granted from his state custody  
 4 pursuant to the state judgment of conviction. § 2254(a), (d).

5 Further, even if the Court could consider the attached Rule 60(b) motions, or  
 6 alternatively assuming that Van Swait had filed the attached Rule 60(b) motions as post-  
 7 judgment motions in the 2005 Action, the Court finds the motions are untimely and fail  
 8 to show extraordinary circumstances warranting relief to prevent a manifest injustice.

9 A Rule 60(b)(4) or 60(b)(6) motion must be brought “within a reasonable time”  
 10 after a judgment is entered. Rule 60(b)(4), (6). “What constitutes a reasonable time  
 11 depends on the facts of each case,” and should take into consideration the reasons for the  
 12 delay and whether the government was prejudiced by the delay. *In re Pacific Far East*  
 13 *Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989) (citations omitted). If timely brought,  
 14 relief under Rule 60(b)(6) requires a showing of “extraordinary circumstances.”  
 15 *Gonzalez*, 545 U.S. 524, 125 S.Ct. at 2650. Rule 60(b)(6) is to be used “sparingly [and]  
 16 as an equitable remedy to prevent manifest injustice.” *United States v. Alpine Land &*  
 17 *Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). “Such circumstances will rarely  
 18 occur in the habeas context.” *Gonzalez*, 125 S.Ct. at 2649. To obtain such relief, “[t]he  
 19 party must demonstrate both injury and circumstances beyond his control that prevented  
 20 him from proceeding with the prosecution or defense of the action in a proper fashion.”  
 21 *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002).

22 This Court entered its order and related judgment dismissing the 2005 Action on  
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24 <sup>2/</sup> Although its not completely clear, it appears Van Swait may be using the  
 25 petitions because he may be under the impression that he can no longer file a Rule  
 26 60(b)(6) motion in the 2005 Action because it is closed and the Ninth Circuit has already  
 27 denied his request for a certificate of appealability. It is clear Van Swait has not directed  
 28 the attached Rule 60(b) motions at the judgment in the 2007 Action because he clearly  
 understands such motions would be subject to dismissal as successive petitions in light  
 of the Supreme Court’s ruling in *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641,  
 2650, 162 L.Ed.2d 480 (2005), which he cites in the Rule 60(b) motion attached to one  
 of the four petitions. (See Petition D, Rule 60(b) motion at 24.)

1 June 13, 2006. (2005 Action, M&O dismissing action without prejudice (docket 84) and  
2 judgment (docket no. 85).) Meanwhile, Van Swait has failed to proffer any legally valid  
3 explanation for his two-year delay in bringing a Rule 60(b)(6) motion. To the contrary,  
4 the Court's records establish that, between June 15, 2006, and September 25, 2006, Van  
5 Swait submitted seven post-judgment filings in the 2005 Action. On August 19, 2007  
6 he also filed his petition in the 2007 Action and made numerous filings in that case until  
7 it was dismissed with prejudice on November 21, 2007. Van Swait's post-judgment  
8 filings and submissions in the 2005 Action and his filings in the 2007 Action demonstrate  
9 Van Swait had the ability and means to file timely Rule 60(b)(6) motions in the 2005  
10 Action, underscore Van Swait's lack of diligence, and negate his ability to demonstrate  
11 that circumstances beyond his control prevented him from bringing timely Rule 60(b)  
12 motions in the 2005 Action. Therefore, the Court finds the attached Rule 60(b) motions  
13 are untimely. *See In re Hammer*, 940 F.2d 524, 526 (9th Cir. 1991) (two-year delay  
14 unreasonable); *Morse-Starrett Products Co. v. Steccone*, 205 F.2d 244, 249 (9th Cir.  
15 1953) (twenty-two months unreasonable when no explanation given for delay). Further,  
16 the Court finds the Rule 60(b) motions do not demonstrate the existence of extraordinary  
17 circumstances, and that the motions also fail to show a manifest injustice will result if  
18 the Court does not reverse the aforementioned orders or vacate the judgment in the 2005  
19 Action. Indeed, as discussed above, the Ninth Circuit's denial of Van Swait's request  
20 for a certificate of appealability in the 2005 Action removes any doubt about the absence  
21 of extraordinary circumstances or manifest injustice warranting relief under Rule 60(b).

22 Accordingly, the Court finds that, whether the attached motions are brought  
23 pursuant to Rule 60(b) (4) or (6), and assuming they can even be properly considered  
24 given that they are not filed in the 2005 Action, the motions are untimely, lack merit, and  
25 are denied.

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**III. Conclusion**

For the reasons discussed above, the reference to the Magistrate Judge is vacated in CV 08-04478 ABC (AN), CV 08-04603 ABC (AN), CV 08-04846 ABC (AN), and CV 08-04982 ABC (AN), and the petitions in these actions are summarily dismissed. The Clerk is directed to file a copy of this Order in each of the foregoing cases. Any and all other pending applications, motions, and requests are terminated.

IT IS SO ORDERED.

Dated: August 27, 2008

/s/ Audrey B. Collins  
AUDREY B. COLLINS  
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Arthur Nakazato  
Arthur Nakazato  
United States Magistrate Judge